IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

WEDNESDAY, THE 10TH OCTOBER 2007 / 18TH ASWINA 1929

Crl.MC.No. 3006 of 2007()

PETITIONER: RESPONDENT

ASHA KUMARI,
HARIMANGALATHU, VARENIKKAL, THEKKEKARA,
MAVAELIKARA.

BY ADV. SRI.RINNY STEPHEN CHAMAPARAMPIL

RESPONDENTS: PETITIONER/STATE

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1. CHANDRAPANICKKER,
KIZHEKKEVAIPIN HOUSE, THADATHIL, THEKKEKKARA,
MAVELIKARA.

2. STATE OF KERALA,
REP. BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR ADV.SRI.GIKKU JACOB

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 10/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

Crl.M.C. No. 3006 OF 2007

Dated this the 28th day of September, 2007

ORDER

Notice given and the learned Public Prosecutor appears for the 2nd respondent.

2. Against the petitioner, a conditional order has been passed by the Sub Divisional Magistrate under 133 of the Cr.P.C. The grievance of the petitioner, to put in a nutshell, is that proper procedure has not been followed by the Sub Divisional Magistrate. The petitioner raises a further contention that the proceedings should not have been initiated at all by the Sub Divisional Magistrate.

3. Be that as it may, I am certainly in agreement with the learned counsel for the petitioner that once a conditional order is passed under Sec.133 of the Cr.P.C., the Sub Divisional Magistrate must scrupulously adhere to the

procedure stipulated under Chapter-XB of the Cr.P.C. and that inevitably includes the following steps:

> (i) The person against whom the conditional order is passed when he appears before the Sub Divisional Magistrate must be questioned as to "whether he denies the existence of any public right in respect of the way, ... etc.
>
> (ii) If he does so, the Magistrate shall, before proceeding under Sec.138 of the Cr.P.C., hold an enquiry into the matter.
>
> (iii) In such enquiry, the Magistrate must enquire whether there is "any reliable evidence in support of such denial".
>
> (iii) If there is any such reliable evidence, proceedings will have to be stayed until the existence of the right is decided by a competent court.
>
> (iv) If there is no such evidence, the Sub Divisional Magistrate must proceed to conduct the next phase of the enquiry under Sec.138 of the Cr.P.C.

(v) In such enquiry under Sec.138 of the Cr.P.C., after such enquiry under Sec.138, appropriate orders must be passed.

(vi) The conditional order must be made absolute with or without modification or vacated.

4. The learned counsel for the petitioner submits that the petitioner was not questioned at all. He further submits that no enquiry under Sec.137 has been conducted at all. The learned counsel further laments that the Sub Divisional Magistrate appears to be proceeding to pass the final order under Sevc.138 of the Cr.P.C. without conducting any enquiry under Sec.137 and/or Sec.138 or the Cr.P.C.

5. I find the grievance of the petitioner to be legitimate, if the assertions of facts are correct. Call for a report from the Sub Divisional Magistrate about the procedure adopted in this case. I make it clear that whatever happened prior to the conditional order cannot be reckoned as sufficient to dispense with any steps in the procedure indicated above which have to be complied with after passing of the conditional order.

6. Await report of the Sub Divisional Magistrate. Call on

8/10/07.

7. Final orders under Sec.138 of the Cr.P.C. shall not be passed prior to 8/10/07.

8. Hand over a copy of this order to the learned counsel for the petitioner.

(R. BASANT, JUDGE)

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